The Defender

VOLUME 13, ISSUE 2 JUNE/JULY 2012

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From The Executive Director's Chair

BUDGET NOTES

Based on a review of recent actions by the Legislature and the Judiciary, there appears to be a renewed interest in increasing the hourly rates paid to court appointed attorneys.

In the early weeks of the Regular Session of the 2012 Legislature, two bills were introduced which would have raised the hourly rates for the first time since 1990.

H.B. 4247, introduced on January 20, 2012, proposed a $30/hour increase to be phased in over three years. By mid 2015, the rates would have been $75/hour for out of court work and $95/hour for in-court proceedings. However, the bill was substantially amended in committee and reduced to provide a single $5/hour increase. The bill passed the House of Delegates and was approved by the Senate Judiciary Committee, but saw no further action in the final days of the term.

The Legislature also considered S.B. 481, which would have provided an increase to $95/hour for in-court work in abuse/neglect proceedings. A committee substitute would have added a proposed increase to $75/hour for out of court work in the same cases. S.B 481 did not pass the Senate Finance Committee.

Meanwhile, the Supreme Court of Appeals has approved an hourly rate increase for attorneys who are appointed to serve as guardians *ad litem* in family court. The new rates permit attorneys to receive $80/hour for out of court and $100/hour for in-court work in these cases.

It is incumbent on all of us to work to advise our legislators of the need to increase the hourly rates.

OVS SYSTEM

The On-Line Voucher System ("OVS"), which has been mentioned for a few years in this column, went live on April 2, 2012. Since that date, PDS has received over 150 registrations for the system, and we recently processed the first group of vouchers submitted under the system. The system is free of charge and very user-friendly, and can be accessed from mobile devices, which therefore allows entry of data at any time. I would encourage all attorneys to log-on and give the system a try.

FINALLY…

As I continue to serve as the Acting Executive Director, I want to encourage everyone to feel free to contact me with any comments or suggestions regarding WVPDS. Please feel free to contact me at the phone number or e-mail address below.

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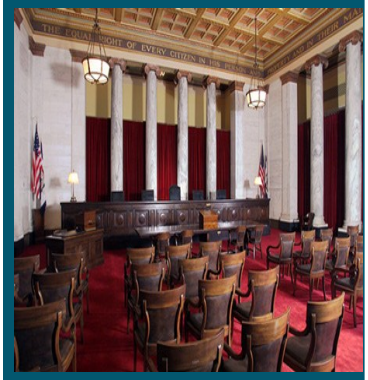


All West Virginia Supreme Court opinions may be reviewed online at www.courtswv.gov

West Virginia Supreme Court Update

State v. Waldron, No. 11-0399 (January 19, 2012) - Davis, J.

In discussing *Crawford v. Washington,* the Court held in a new syllabus point that recorded statements made between a confidential informant and a defendant are admissible against the defendant even when the informant does not testify, as long as the statements are not offered for the truth of the matter asserted.

Affirmed.

State v. Sulick, No. 11-0043 (February 23, 2012) - Davis, J.

The Court affirmed the petitioner's convictions for three counts of criminal civil rights violations, holding *inter alia* that the civil rights violation statute (61-6-21(b)) is not unconstitutionally vague.

Affirmed.

State v. Hoston, No. 11-0120 (consol. with **State v. Riley**, 11-0457) (February 24, 2012) - Workman, J.

The petitioners challenged the court's denial of their motions to suppress evidence obtained through the use of "body wires". The petitioners argued that the electronic recordings were invalid because the use of the "body wires" was authorized by magistrates, rather than designated circuit judges. The Court rejected the claims, finding that revisions to the Code (specifically 62-1F-1, et. seq.) permitting magistrate authorization for electronic interception did not conflict with either *State v. Mullens* or the Wiretapping Act.

Affirmed.

State v. Surber, No. 11-0361 (February 24, 2012) - Per Curiam

The petitioner, charged with first-degree murder and a number of other offenses, elected to represent himself and entered guilty pleas to nearly all of the charged offenses. The Court rejected the petitioner's arguments that his guilty pleas were involuntary, that his right to counsel had been violated, that he had received ineffective assistance of standby counsel and that he had received a disproportionate sentence.

Affirmed.

In re: Ashton M., No. 11-0755 (February 28, 2012) - Per Curiam

The Court reversed the order of the circuit court terminating the parental rights of the biological mother, determining that the court had failed to conduct a dispositional hearing following rejection of a proposed case plan, and had also failed to consider the wishes of the child (who was over the age of fourteen) before ordering termination.

Reversed and Remanded.

State v. Judge, No. 11-0089 (March 22, 2012) McHugh, J.

The Court held that under the provisions of the Sex Offender Registration Act, the petitioner, who was incarcerated for one night on a unrelated charge, was not required to update his registration status, as there had been no change in previously reported information and sufficient time had not passed to require address verification.

Affirmed Dismissal of Indictment.

White v. Miller, Comm'r, No. 11-0171 (March 26, 2012) - Ketchum, J.

In discussing the use and admissibility of the horizontal gaze nystagmus ("HGN") test, the Court determined that while the test is an accepted field sobriety test, a driver's license cannot be revoked solely and exclusively on the results of the HGN test. The Court remanded the matter to determine the legality of the sobriety checkpoint utilized at the time of the traffic stop.

Reversed and Remanded.

Miller, Comm'r v. Chenoweth, No. 11-0148 (May 10, 2012) - Per Curiam

The Court reversed the decision of the circuit court, determining that there was no illegal stop of the respondent's vehicle, which according to the police officer was parked and protruding onto the roadway. The Court rejected the respondent's argument that there was no articulable reasonable suspicion to justify the stop. (The Court did not address the petitioner's argument that the exclusionary rule is inapplicable in administrative revocation proceedings.)

Reversed.

State v. Crouch, No. 11-0394 (May 24, 2012) - Per Curiam

The petitioner was convicted of voluntary manslaughter. On appeal he argued that the court improperly instructed the jury as to the elements of involuntary manslaughter. The Court agreed, finding that the trial court had incorrectly substituted the word "lawful" for "unlawful" in the instruction. The Court noted that the trial court had read the incorrect language on two occasions.

Reversed and Remanded.

State v. Tanner, No. 11-0634 (May 24, 2012) - Davis, J.

The Court considered the provision of the Home Incarceration Act, and specifically the provision permitting the circuit court to grant parole and to impose certain specific conditions. The Court affirmed the decision of the circuit court to grant parole under the terms of the Act, and further affirmed as a condition of the petitioner's parole that she have no contact with her husband (her co-defendant) during the term of her parole. The Court rejected the petitioner's argument that the condition was a burden on her right of marriage.

Affirmed.

Coleman, Warden v. Brown, No. 11-0378 (June 1, 2012) - Per Curiam

The Court reversed the ruling of the circuit court granting habeas corpus relief to the respondent. The circuit court had determined that the failure of a juror to properly respond to voir dire questions constituted a violation of *State v. Dellinger* and required a new trial. The Court held that the juror's responses to questions regarding her knowledge of various witnesses and attorneys did not show bias or impartiality constituting a violation of the respondent's right to an impartial jury.

Reversed and Remanded with Directions.

State v. Myers, No. 11-0497 (June 1, 2012) - Per Curiam

The petitioner was convicted of three counts of first degree robbery. He assigned numerous error on appeal. The Court held (1) various items of evidence seized from the petitioner were properly admitted; (2) the in-court identification of the petitioner was not tainted by an alleged suggestive out-of-court identification; (3) the petitioner's conviction on three counts of robbery, involving three separate victims, did not violate double jeopardy; and (4) the evidence was sufficient to sustain the convictions.

Affirmed.

Miller, Comm'r v. Toler, No. 11-0352 (June 6, 2012) - Workman, J.

Answering a question left undecided one month earlier in *Chenoweth*, the Court determined that the judicially created exclusionary rule is not applicable in civil administrative drivers license revocation proceedings. Citing authority from several jurisdictions, the Court stated that the deterrence factor implicit in the exclusionary rule is designed for criminal proceedings, and the societal costs of applying the exclusionary rule in license revocation matters would outweigh any benefits derived therefrom.

Reversed and Remanded.

Lawyer Disciplinary Board v. Santa Barbara, No. 10-4011 (June 7, 2012) - Per Curiam

The respondent attorney objected to the sanctions recommended by the Lawyer Disciplinary Board for various acts of misconduct, including failure to act with reasonable diligence and failure to communicate with clients. The Court rejected the respondent's contention that mitigating factors, including depression and misconduct by a former employee, justified a less restrictive sanction.

Law License Suspended for One Year and other Sanctions.

State v. Scarbro, No. 11-0090 (June 7, 2012) - Per Curiam

The petitioner was convicted of fraud in connection with the use of the victim's debit card. The State alleged that the petitioner and two other persons obtained the card and used it to purchase cigarettes and other merchandise. The Court held that the defense was improperly prohibited from admitting a prior inconsistent statement made by a State's witness (one of the petitioner's co-defendants). The statement indicated that the co-defendant had accidentally used the card, contradicting his trial testimony that he had used the card with the petitioner's consent and knowledge.

Reversed and Remanded.

Miller, Comm'r v. Smith, No. 11-0147 (June 7, 2012) - McHugh, J.

The Court reversed the circuit court's order setting aside the license revocation of the respondent. The Court discussed the transition of authority in administrative proceedings and held that the DMV properly had jurisdiction to create interim rules and preside over revocation proceedings during the transition. The Court further noted that the newly-created Office of Administrative Hearings would have jurisdiction over appeals of incidents occurring on or after June 11, 2010.

Reversed and Remanded with Directions.

State v. Griffy, No. 11-0533 (June 8, 2012) - Per Curiam

The petitioner entered a guilty plea to two counts of grand larceny. On appeal he argued that the trial court had failed to advise him during his plea that if the court chose not to accept the recommended sentence he would have no right to withdraw his guilty plea. The Court concurred with this argument, noting that the trial court had failed to comply with the plain language of Rule 11(e)(2) of the Rules of Criminal Procedure.

Reversed and Remanded.

SER Plants v. Webster, No. 12-0404 (June 12, 2012) - Per Curiam

The State sought a writ of prohibition to challenge the ruling of the trial court ordering suppression of shell casing evidence as a sanction for failing to provide the evidence for inspection. The Court granted the requested writ, finding that the lower court's reliance on *State v. Osakalumi* was misplaced, and that under the factors set forth in *SER Rusen v. Hill* there was no evidence of bad faith in regard to the State's failure to produce the evidence.

Writ of Prohibition Granted.

SER Thompson v. Ballard, No. 11-0307 (June 13, 2012) - Per Curiam

The Court affirmed the lower court's refusal of the petitioner's habeas corpus petition, holding (1) there was sufficient evidence of the approximate date of the sexual offenses; (2) the petitioner's argument as to the admission of the testimony of a medical expert did not establish a proper constitutional basis for habeas corpus relief; and (3) trial counsel's conduct, including his purported failure to locate an allegedly exculpatory letter, did not amount to ineffective assistance of counsel.

Affirmed.

State v. Dunbar, No. 11-0555 (June 13, 2012) - Per Curiam

The petitioner was convicted of possession with intent to deliver a controlled substance. On appeal the petitioner argued that the arresting

officer did not have an articulable reasonable suspicion to stop the vehicle in which the petitioner was a passenger. The Court agreed, noting that the sole grounds provided for the vehicle stop was a missing passenger side mirror. The Court noted that because such a mirror is not required equipment, a stop for such an alleged violation is improper.

Reversed and Remanded.

State v. Bostic, No. 11-0617 (June 14, 2012—McHugh, J.

In answering two certified questions, the Court determined that a person who was required to register for a ten-year period under the previous version of the Sex Offender Registration statute was required to register for life under the revised version if the underlying offense otherwise qualified the person for lifetime registration. The Court also held that the provision of the Act vesting the West Virginia State Police with authority to notify registrants of increases in the registration period did not violate the separation of powers.

Certified Questions Answered.

Miller, Comm'r v. Wood, No. 11-0815 (consol. with **Miller, Comm'r v. Thompson,** No. 11-0891) (June 18, 2012) - Benjamin, J,

Each of the respondent drivers' entered *nolo contendre* pleas to criminal DUI charges, and each appealed the petitioner's order automatically revoking their driver licenses based solely on the "convictions" resulting from the pleas. On appeal of these rulings, the circuit court determined that the respondent's no contest pleas did not constitute "convictions" under 17C-5A-1a of the Code. The Court concurred, holding in a new syllabus point that a plea of no contest does eligible drivers are entitled to administrative revocation hearings.

Affirmed.

State v. McGilton, No. 11-0410 (June 19, 2012) - Workman, J.

The petitioner was convicted of three counts of malicious assault based upon a single incident involving his wife. On appeal, he argued that the stab wounds were essentially simultaneous and that multiple convictions for the wounds violated double jeopardy principles. The Court disagreed and in a new syllabus point stated that a defendant can be convicted of multiple offenses of malicious assault even when the offenses were part of the same course of conduct, as long as the facts demonstrate separate and distinct violations of the statute.

Affirmed.

Miller, Comm'r v. Epling, No. 11-0353 (June 21, 2012) - Benjamin, J.

The petitioner appealed the circuit court's ruling remanding the respondent's administrative license revocation for a full evidentiary hearing. Overruling *Choma v. West Virginia DMV*, the Court held that the dismissal or acquittal of an underlying criminal action has no preclusive effect upon subsequent revocation proceedings, and that evidence of such a dismissal or acquittal is not admissible to establish the truth of any fact in revocation hearings. The Court determined, however, that the hearing examiner did not conduct an adequate analysis of the testimony and remanded the matter for a full hearing.

Affirmed in part and Reversed in part.

State v. Stone, No. 11-0519 (June 21, 2012) - McHugh, J.

The petitioner was involved in an automobile accident which killed five people and injured several other persons. He was convicted of numerous offenses including, *inter alia*, twelve counts of leaving the scene of an accident. On appeal he argued that under the applicable statute, he could be convicted only of a single count of leaving the scene of an accident. The Court examined the statute (17C-4-1) and determined that under the rule of lenity, the word "any" in the statute applied in a singular context and therefore the petitioner could only be convicted of a single count of the offense. The Court rejected the remaining assignments of error and remanded the case for re-sentencing.

Affirmed in part and reversed in part.

State v. Jenkins, No. 11-0362 (June 21, 2012) - Per Curiam

The petitioner was convicted of first degree felony murder in connection with the drug overdose death of his teenage son. The Court considered and rejected numerous assignments of error, holding (1) the State was not required to elect a theory of prosecution between felony first-degree murder and death of a child by parent; (2) there was sufficient evidence to sustain the convictions; (3) the petitioner waived argument with regard to whether the jury was properly instructed as to felony murder; (4) suppression of the petitioner's statement only for the purposes of the State's case-in-chief was not error; (5) photographs of the victim were not gruesome; and (6) evidence that the petitioner's son had obtained controlled substances with the petitioner's knowledge or cooperation did not violate Rule 404(b) of the Rules of Evidence.

Affirmed.

WVPDS ANNUAL CONFERENCE
JUNE 21-22, 2012 - Embassy Suites, Charleston, WV

On June 21-22, 2012 West Virginia Public Defender Services sponsored its Annual Public Defender Conference at the Embassy Suites in Charleston, West Virginia.

The Conference was attended by nearly 220 attorneys and over 40 PD office support staff.

Speakers included Patrick Barone of Birmingham, Michigan; William Pfeifer of Birmingham, Alabama; Cindene Pezzell and Sue Osthoff from Philadelphia, Pennsylvania; and Allan Trapp of Carrolton, Georgia.

The Conference also featured Ira Mickenberg, who presented two sessions; Judge Russell Clawges of the 17th Judicial Circuit; and Danielle Cox of the West Virginia Office of Technology.

The support staff sessions also featured James Rollins of the WV Equal Employment Opportunity Office; John Fisher of the State Treasurer's Office; Shelly Murray of the Division of Purchasing; Lisa Trump of CPRB; and Michael Hall and Kris Wendorff from Westlaw.

Thanks to all of our speakers and participants who helped make this years' Annual Conference a success.

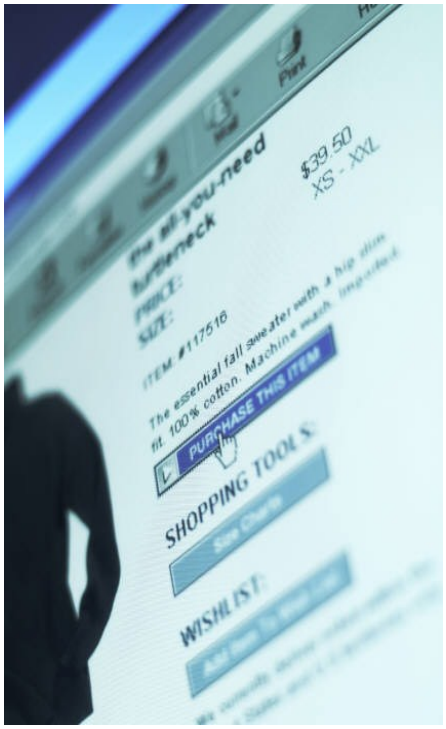
(*Top left—Allen Trapp; Bottom Left: Ira Mickenberg*)

WVPDS Website to be Re-Designed in Near Future

West Virginia Public Defender Services will be re-designing our current website in the coming months.

The redesign should make the website more user-friendly and will better integrate numerous PDS functions, including the new OVS system, into the website.

The new site will feature clearly designated sections designed for the Voucher Processing Section, Criminal Law Research Center, Appellate Advocacy Section and Administrative -Public Defender Operations Section.



On-line Voucher System ("OVS") Information

If you are interested in obtaining further information about WVPDS new On-Line Voucher System, please contact either Sheila Coughlin or Teresa Asbury at (304) 558-3905 or by fax at (304) 558-6612.

The OVS system is provided at NO COST to users and promises to speed up the voucher submission, processing and payment processes.

The system may be accessed from a computer or mobile device, offering users the opportunity to enter data and review vouchers at any location.

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